ANSWERS for Sir *William Cockburn*

TO

The Petition of *Mark Carſs* of *Cockpen*, and others the Creditors of *Thomas Calderwood*.

THIS Caſe has been ſo frequently under Conſideration, that it will certainly be needleſs to trouble the Lords with a State of the Fact. The Queſtion in Diſpute is, If an Adjudication led in the 1693, not to this Day quarrelled by a Reduction or Improbation, ought to be ſet aſide, in reſpect the Executions of the ſpecial and general Charge are not now produced? The Queſtion has been moſt juſtly decided in Favours of Sir *William* by the Interlocutor recited in the Petition, finding, *That the Want of the Executions of the general and ſpecial Charge after 20 Years is no Nullity nor Ground of Reduction.*

Againſt this Interlocutor the Creditors of *Calderwood* reclaimed by a Petition now to be anſwered: And in the *Firſt* Place obſerve, That the Reaſon of Reduction would be competent and relevant within 20 Years, and that no Statute, or Act of *Sederunt*, that they knew of, has fixed that Period for defeating the ſaid Nullity. *2do*, They are pleaſed to aſſert, that ſuch Executions are not left as Warrants with the Clerks, nor are they Warrants, but brought *ad modum probationis* by the Purſuer of his *medium contendendi*, and conſequently, are of the ſame Nature with the Inſtructions of Debt, ſuch as Bonds and Bills.

It is anſwered, That Sir William the Purſuer cannot agree with the Petitioners, that the Want of the general or ſpecial Charges, even within 20 Years, would infer a Nullity; perhaps it might be ſuſtained, if no good Cauſe was aſigned for the Want of them, to reſtrict an Adjudication to a Security. But that is not the Caſe; not only 20, but near 20 Years were expired, e're the Purſuers Diligence was challenged upon Account of this alledged Defect, and tho' the Petitioners know of no Statute or Act of *Sederunt*, touching the Limitation of 20 Years, mentioned in the Interlocutor, they cannot but know, that by the conſtant Practice of this Court, after 20 Years, no Warrants of a Decreet of any kind need to be exhibited, by the Uſer of it. And this conſtant Cuſtom is equal certainly to either Statute or Act of *Sederunt*, and this the Petitioners themſelves would admit, eſpecially if they had conſidered, that there is no Warrant for a ſpecial Charge, *ſo far as the Defender knows*, either from Statute or Act of *Sederunt*, other than Cuſtom and Practice ſince the 1672.

It is a Miſtake, That a ſpecial or general Charge, or the Executions thereof, ſhould be held as Grounds, and not as Warrants of a Decreet; and it is certain, that for moſt part they have been in uſe to be left in the Clerks Hands as Warrants. But then ſuppoſing it to be true, as the Petitioners alledge, that the general and ſpecial Charge, and the Executions thereof, are brought by the Purſuer *in modum probationis* of his *medium contendendi*, it will not from thence follow, that they are of the Nature of Inſtructions of Debt, ſuch as Bonds or Bills: On the contrary, what is produced *ad modum probationis*, is moſt properly a Warrant, as on the other Hand, a Bill or Bond is a Ground of a Decreet, as being indeed the Title of the Purſuit. And to make this clear by an Example; ſuppoſe, the paſſive Title inſiſted upon ſhould be behaviour as Heir, or Intromiſſion with the Charter Cheſt; it will not be pretended, that a Decreet of Adjudication would be void, which proceeded upon a Decreet of Conſtitution, in which a Proof of the Facts inferring the Behaviour, or Intromiſſion aforeſaid, was duely led, unleſs the Depoſitions of the Witneſſes, by which ſuch Behaviour and Intromiſſion was proved, were produced, theſe Depoſitions muſt certainly be looked upon as Warrants. And as there is no uſe for the general Charge, but to produce the ſame *ad modum probationis*, that a legal Form has been uſed to conſtitute a paſſive Title againſt the Defender; not for the ſpecial Charge, but to prove this other Fact, that the Defender not renouncing, was again charged to enter Heir, purely to eſtabliſh the Eſtate of his Predeceſſor to whom he might be Heir, (by a Fiction) in his Perſon; it is equally reaſonable, that theſe general and ſpecial Charges, with their Executions, be held as Warrants.

It is a quite different Caſe, when a Defender is found liable, upon a Teſtament confirmed by him, or a general Retour: For there are proper Records of theſe, by which the Paſſive Title can alwiſe be inſtructed, the Production in ſuch Caſes cannot be ſatisfied but by an Extract; and if the Purſuer is not able to vouch that the Defender was retoured Heir in general to the Debitor, he proceeds to adjudge at his Peril: In the ſame manner, as he does, who Adjudges a Man's Lands, without charging him to enter Heir in General, or in Special; but when Decreets of the Lords, (in which all Things are preſumed to have been *ſoleniter acta*) regularly bear the Production of theſe Charges and Executions, of the laſt of which there is no Record, it would be extream hard to ſet aſide a formal Diligence, (eſpecially in the Perſon of a ſingular Succeſſor, which is here the Caſe) purely on account of not Production thereof; when at the ſame Time it muſt be admitted, that after 20 Years, there is no Neceſſity to produce the Executions of the Summons of Adjudication or Conſtitution, *cognitionis cauſa*, or even the Sentence of the Judge proceeding upon either of theſe Summonſes, carrying them into a Decreet.

It is a Miſtake, That whatever is mentioned in the Production is to be held as a Ground, and not as a Warrant of the Decreet. For in the firſt Place, a Decreet of Circumduction extracted in the Courſe of the Proceſs, in which it is obtained, is ordinarily mentioned in the Production of the final Decreet; and yet it can with no Juſtice be ſaid, that it is a Ground of ſuch Decreet, without which it cannot ſubſiſt. *2do*, Parties for inſtructing of Alledgances againſt their Debitor, are frequently put to the Neceſſity of recovering the Writs of third Parties, to inſtruct their Alledgances, and theſe when recovered are always mentioned in the Production: But it cannot be pretended, that when ſuch Writs are recovered, and produced, by which the Interlocutor of the Judge is obtained, finding ſuch and ſuch a Fact proven by them, that there is any Neceſſity for the Party who recovered and produced them *ad modum probationis*, either to forfeit the Benefit he has by his Decreet, or again to produce theſe Writs at any Diſtance of Time; which as it would be unreaſonable in many Caſes, would be often impracticable. Wherefore it is pretty evident, the Lords in ſuch Caſes behooved in Juſtice to ſuſtain the Decreet as a *probatio probata*. The Execution of the Summons is taken Notice of, and mentioned in the Production, yet no Body will pretend, that if it be mentioned to have been produced in the Decreet, that Decreet may be opened if the Executions ſhould afterwards fall by: So that many Caſes may be figured, where ſeveral Things may be entered into the Production, and nevertheleſs, being only produced *ad modum probationis*, are not needful again to be produced, at any Time within the Years of Preſcription, and the Caſe of ſingular Succeſſors is ſtill favourable.

The Petitioners admit, our Practick has made no Difference betwixt the general and ſpeecial Charge, and it is plain by the Deciſion *Brown* contra *Home* 18th *Feb.* 1675, that the Charge to enter Heir was reckoned amongſt Warrants of a Decreet, and therefore Certification was not allowed to go againſt it after 20 Years; and conſequently, *ex conceſſis*, the Want of the Execution of the ſpecial Charge is no Nullity, or good Reaſon of Reduction. The Petitioners nevertheleſs endeavour to ſhow, that there is a Diſparity, chiefly founded upon this, that the Decreet of Conſtitution may proceed upon a Proof of other paſſive Titles, or holding the Defender as confeſt; and that by the Act of Parliament 1540 introducing ſpecial Charges, they are made the only Mid-couple of the Tranſmiſſion of real Rights, where the apparent Heir lies out not entered.

It is anſwered, That tho' Decreets of Conſtitution may proceed upon the Proof of other paſſive Titles than the general Charge to enter Heir; yet there is not one Decreet of Conſtitution of one Hundred, that is founded on any other paſſive Title. And ſince the Petitioners themſelves admit, that when the Decreet of Conſtitution is founded upon any other paſſive Title, there would not after 20 Years be needful any other Inſtruction thereof, but the Faith of the Clerk, and other Members of Court, becauſe of the Preſumption that all Things were *ſoleniter acta*, they muſt according to the foregoing Part of the Argument admit, that the ſame Preſumption takes Place, as to the general Charge and Executions thereof. For the Proof of the paſſive Title, whatever it is, is the Inſtruction of the *medium contendendi*, which the Petitioners do affirm is of the ſame Nature with the Inſtruction of the Debt, whereupon the Libel proceeds; but they do admit, that the Decreet of Conſtitution will of itſelf inſtruct that *medium contendendi* in many Caſes,

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and conſequently it ought to do ſo in this, ſince there is no juſt Ground of Difference aſſigned.

And there is the ſame Reaſon, That the Decreet of Adjudication ſhould of itſelf inſtruct the *medium contendendi* thereof, ſince the ſpecial Charge and Execution thereof, only produced *ad modum probationis* in the Proceſs of Adjudication, as the general Charge and Execution thereof is produced in the Proceſs of Conſtitution.

It is a Miſtake, That ſpecial Charges are introduced by Act of Parliament, which only relates to the general Charge, and ſpecial Charges were only introduced by Cuſtom; and therefore it is very reaſonable that the Production of them, after 20 Years, ſhould be regulated by the Cuſtom obſerved in other Caſes, relating to Production of Warrants of a Decreet.

It is alſo a Miſtake, that the ſpecial Charge is as neceſſary a Midcouple in the Tranſmiſſion of Land Rights, as a ſpecial Service and Retour, and Inſeſtment thereon: For, where the Heir renounces, there is no Neceſſity for a ſpecial Charge, and yet it muſt be confeſt, that the Renounciation by no Means veſts, but on the contrary diveſts, the Heir, who renounces, of the Right to his Predeceſſors Eſtate.

As then the Petitioners Argument manifeſtly fails in the Example now given, ſo according to the Opinion of the Lord *Stair* in his Inſtitutions, *Page* 749, there is no Neceſſity at all for a ſpecial Charge, for founding an Adjudication, but that the general Charge is ſufficient, whether the Heir charged renounce or not. That learned Author, after noticing the Manner in which the ſpecial Charge was introduced, and that the ſame became the immediate Warrand for the Appriſing, immediately ſubjoins theſe Words, *But now Appriſings being laid aſide, Adjudication proceeds upon the general Charge, whether the apparent Heir renounce or not.* And to the ſame Purpoſe he delivers his Opinion, *Page* 648, about the Middle, in theſe Words, *Tea albeit in Appriſings againſt apparent Heirs, there behoved firſt to be a Decreet againſt the apparent Heir as lawfully charged to enter Heir, and after that a ſpecial Charge to enter Heir to his Lands or heritable Rights; yet, this is not neceſſary in Adjudications, which are mainly declaratory Actions* contra hereditatem jacentem, *wherein the Heir needs not to be charged to renounce*; and in the Index of the ſaid Inſtitutions, on the Word *Adjudication*, it is expreſly ſaid, *Adjudications againſt Heirs need no ſpecial Charge now, but only a general.* And indeed his Lordſhips Opinion ſeems to be very well founded: For the Certification of the general Charge not only is, *That if the Heir faill to enter, the Complainer ſhall have ſicklike Action, Proceſs and Execution againſt him, as he might have had, if he were entered Heir to his ſaid Deceaſt Father.* But alſo, *as the Complainer might have had againſt his ſaid Deceaſt Father at any Time in his Lifetime, before his Deceaſe, or as if he were yet on Life, for Payment and Satisfaction*, &c. which laſt Alternative manifeſtly comprehends the Proceſs of Adjudication. 2*do*, There was but one Charge introduced by the Act 1540, by which it is ſtatuted, *That the Heir failing to enter in Obedience to the Charge, Letters ſhould be directed by the Sheriff of the Shire to appriſe the Lands to the Creditors:* And tho' 'tis true, that afterwards ſpecial Charges were introduced by Cuſtom: Yet, the Act 1672, which abrogated Appriſings, and eſtabliſhed Adjudications, proceeds upon the Narrative, *That many unneceſſary Solemnities were uſed in Compriſings*; and therefore Statutes that the Lords of Seſſion, upon Proceſſes raiſed before them at the Inſtance of any Creditor againſt his Debitor, ſhall adjudge, *&c.* And it ſeems to have been my Lord *Stair*'s Opinion, that the ſpecial Charge by this Act of Parliament was rendered unneceſſary, Adjudications being mainly declaratory Actions, and the Act of Parliament only requiring a Proceſs of Adjudication to be brought before the Lords, *by a Creditor againſt his Debitor*, which an Heir unentered certainly becomes, by a Decreet of Conſtitution upon a general Charge. 3*tio*, By the Form of a Decreet of Appriſing, the Meſſenger judicially ſold, aſſigned and diſponed in Favours of the Creditor the Purſuer, in common Stile of a Diſpoſition, the Lands and others appriſed, in Place of the Heir charged to enter in ſpecial; ſo that there was ſome Neceſſity by a Fiction to eſtabliſh that Property in the Perſon of the Heir, but the Decreet of Adjudication directly adjudges the Ground, Right and Property to belong to the Creditor, requiring no more, than a Proceſs of Adjudication, and that it be led againſt a proper Debitor.

But ſuppoſing a ſpecial Charge to be neceſſary, it is unreaſonable to ſuppoſe, there lies as great a Neceſſity upon a Creditor to ſhow the ſame was executed,

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as there is for a Creditor to inſtruct, that the Perſon againſt whom he directly adjudged, was inſeſt upon a Retour, or Precept of *clare conſtat*. For there are Records of Retours, and Inſeſtments, by which theſe can always be inſtructed; but there is no Record of the Executions of the general and ſpecial Charge, and therefore it were highly unreaſonable, till the Lords ſupply that Defect, to put theſe Executions upon a different Foundation from the Executions of other Summonſes, which moſt certainly are equally neceſſary to compleat a formal Adjudication.

And notwithſtanding of the Difference the Petitioners make, betwixt the Reduction of Retours after 20 Years, and the Production of ſpecial Charges, and Executions thereof after that Time, the Purſuer muſt humbly think, that the Act of Parliament prohibiting the Reduction of Retours after 20 Years, affords a very ſtrong Argument for him, in Point of Analogy; For tho' 'tis true, that that Act of Parliament mentions not the Inſeſtment proceeding upon the Retour, and that the ſpecial Charge and Execution thereof, was introduced to ſupply the Want both of the ſpecial Retour and Inſeſtment, in the Caſe of Appryſings: Yet it is extreamly plain, that if a ſpecial Retour could not be ſo much as challenged, or ſought to be produced after 20 Years, the Inſeſtment alſo could not be quarrelled, it being abſurd to imagine, the Warrant of an Inſeſtment could not be quarrelled, and that yet the Inſeſtment could. And tho' 'tis true, that Retours and Inſeſtments behoved after 20 Years to be produced, as Titles in Purſuits; yet that will not apply to the ſpecial Charge and Executions thereof; for it is the Adjudication in this Caſe that is the Title of the Purſuit, and not the ſpecial Charge and Execution, which never was nor can be ſuſtained as a Title. But to ſtate the Caſe habily; Suppoſe a Perſon inſeft on a Retour, ſhould obtain a Charter of Reſignation and Inſeſtment thereon, and that it were objected, that ſuch Charter and Inſeſtment was void, in reſpect the Reſigner never was retoured and inſeſt as Heir; it is certain, that in that Caſe it would be ſufficient to condeſcend upon the Retour and Inſeſtment, without Neceſſity to produce the ſame: And therefore in this Caſe it is equally reaſonable, the Adjudication be ſuſtained without Production of the ſpecial Charge and Execution, which the Decreet of Adjudication it ſelf fully preſumes once to have been duly produced; and that Defect, that there is no Record of the Executions of ſpecial Charges, ought not in Juſtice or Equity to make any Difference, it being impoſſible in many Caſes to carry a Fiction the full Length of the Thing feigned.

The Petitioners in the next Place repreſent, That the Purſuer is not in the Caſe of the Interlocutor, becauſe of certain Specialities urged from the Bar, *viz.* That Sir *David Hay* his Author was in 1695 called in a Proceſs of Ranking and Sale, that there is a Compearance for him, and that the Term ſtands circumduced againſt him for not producing his Intereſt, and deponing upon the Verity of his Debt: Whence the Petitioners infer, that the general and ſpecial Charges, and Executions thereof, were wanting within the 20 Years.

'Tis anſwered, That now there is an Interlocutor repelling theſe Objections: 2*do*, The Interlocutor is very juſt; for there was nothing but a ſimple Proceſs of Ranking carried on, without the Aid of a Proceſs of Reduction and Improbation; the other Creditors compeating produced no more than their Adjudications, and Grounds of Debt, as appears from ſeveral Paſſages in the Decreet of Ranking and Sale; there was no Circumduction for not Production, but ſingly for not Deponing upon the Verity of the Debts, which was inept, till ſuch Time as either there was a Production thereof, or a Circumduction for not Production; and it is moſt certain, that Sir *David Hay* died during that Dependence in the Year 1699; even before *Calderwood* the Purſuer of the Proceſs of Sale deponed upon the Verity of his Debt, which was not till the 23d *December* 1722, as appears by the 57th Page of the Decreet of Ranking and Sale.

2*dly*, That Circumduction was intirely inept for another Reaſon, *viz.* That the Ranking being a Ranking of *Ryſlay*'s Creditors, and not a Ranking of *Martin*'s Creditors, againſt whoſe Heir the Adjudication was led, the Verity of the Debt to be deponed upon was the Verity of *Martin*'s Debt againſt *Ryſlay*, which was acknowledged by *Calderwood* the Purſuer, it being the very Title upon which he himſelf claimed: Nor was there any Neceſſity upon Sir *David Hay* to produce in that Proceſs the Warrants of his Adjudication againſt *Martin*'s Heir, unleſs they had been ſpecially called for, ſince *hoc non agebatur* to rank *Martin*'s Creditors, but to rank *Ryſlay*'s

In Reſpect whereof, the Deſire of the Petition ought to be refuſed.

HEW DALRYMPLE.